SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO. 832

ALEXANDER J. SALERNO and WILLIAM VALENTINE,
Petitioners,

against

BOWIE KUHN, individually and as the Commissioner of Baseball,
Respondent,

AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS, an unincorporated association, JOSEPH E. CRONIN individually and as President of the American League of Professional Baseball Clubs, and PAUL PORTER,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Petition:

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WALTER BECK.

INDEX

	PAGE
Table of Statutes	ii
Table of Cases	ii
Jurisdiction	2
Questions Presented	2
Applicable Statutes	3
Statement of the Case	5
Facts	6
Reasons for the Allowance of the Writ	7
POINT I—Baseball is admittedly a business engaged in interstate commerce and, as such, should be held subject to the anti-trust laws of the United States	10
POINT II—The *Federal Baseball* and *Toolson* cases have no application to the present-day status of professional baseball and should be overruled by this court	14
POINT III—The complaint states a good cause of action under the anti-trust laws: the motion to dismiss the action should have been denied	15
POINT IV—The relief sought herein can be obtained only in the courts of the United States: the doctrine of primary jurisdiction of the National Labor Relations Board does not apply to this case	19
Conclusion	19
APPENDIX A—Opinion of Judge Thomas F. Croake	20
APPENDIX B—Opinion of the United States Court of Appeals for the Second Circuit	25

PAGE

TABLE OF STATUTES

Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 ..... 2, 3, 4

Clayton Antitrust Act, 15 U.S.C. § 15 ..... 2, 4

TABLE OF CASES

Federal Baseball Club v. National League, etc., 259 U. S. 200 ..... 2, 10, 11, 12, 13, 15

Toolson v. New York Yankees, Inc., 346 U. S. 356 .. 2, 10, 13

Klor's, Inc. v. Broadway-Hale Stores, Inc., et al., 359 U. S. 207 ..... 8, 17

Fashion Originators Guild of America v. FTC, 312 U. S. 457 8

Local Union No. 189, Amalgamated Meat Cutters and Butcher Work Men of North America, AFL-CIO, et al. v. Jewel Tea Co., Inc., 381 U. S. 676 ..... 9, 10

United States v. Western Pacific Railroad Co., 352 U. S. 59 9

The American League of Professional Baseball Clubs and Association of National Baseball League Umpires, 180 N.L.R.B. No. 30 11

Hart v. Keith Vaudeville Exchange, 262 U. S. 271 ... 12

U. S. v. International Boxing Club, 348 U. S. 236 .... 12, 13

Blau v. Lehman, 368 U. S. 403 13

Helvering v. Hallock, 309 U. S. 106 13

U. S. v. Shubert, 348 U. S. 222 15

Brown v. Board of Education of Topeka, 347 U. S. 483 15

Radovich v. National Football League, 352 U. S. 445 .. 15, 18

Washington Professional Corp. v. National Basketball Association, 147 F. Supp. 1954 18

In the

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. .....

Alexander J. Salerno and William Valentine,
Petitioners,

against

Bowie Kuhn, individually and as the Commissioner of Baseball,
Respondent,

American League of Professional Baseball Clubs, an unincorporated association, Joseph E. Cronin individually and as President of the American League of Professional Baseball Clubs, and Paul Porter,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Alexander J. Salerno and William Valentine, pray that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, rendered on July 13, 1970, which affirmed a final judgment entered in the United States District Court for the Southern District of New York on December 10, 1969, by the Honorable Thomas F. Croake,

District Judge, which granted the motion of the defendant-respondent, Bowie Kuhn, for an order dismissing this action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

The opinion of the United States Court of Appeals for the Second Circuit is attached as part of the appendix to this petition and is not yet officially reported. The opinion of District Judge Thomas F. Croake is attached as part of the appendix to this petition and is reported at 310 Fed. Supp. 729.

Jurisdiction

The final decision of the Court of Appeals, Second Circuit, was entered on July 13, 1970.

The jurisdiction of this court is invoked under 28 U. S. Code 1254(1).

Questions Presented

1. Are the anti-trust laws, particularly the Sherman and Clayton Acts, 15 U.S.C. Sections 1, 2 and 15, applicable to the business of professional baseball?

2. Should the cases of *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), be overruled by this court in light of the uncontradicted fact that baseball now is a business engaged in interstate commerce?

3. If professional baseball is held to be subject to the anti-trust laws, does the complaint herein state a cause of action under the Sherman and Clayton Acts?

4. May a Federal Court consider the claim herein asserted of a violation of the anti-trust laws even though the

National Labor Relations Board has before it an unfair labor practice proceeding arising out of the same facts and circumstances?

Applicable Statutes

15 U. S. Code § 1

§ 1. Trusts, etc., in restraint of trade illegal; exemption of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided, further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combina-

tion or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. Code § 2

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U. S. Code § 15

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

Statement of the Case

Petitioners, employees of the American League of Professional Baseball Clubs, instituted an action at law in the United States District Court for the Southern District of New York against the respondent, Bowie K. Kuhn, individually and as the Commissioner of Baseball, and against other named defendants for treble damages for violations of the Sherman Anti-Trust Act and Clayton Act, arising out of the dismissal and boycott of petitioners from employment as professional baseball umpires in the major leagues.

An action was commenced by filing a complaint on September 23, 1969, which was served upon the respondent, Bowie K. Kuhn on October 3, 1969 and served upon the defendants, American League of Professional Baseball Clubs and Joseph Cronin, individually and as President of The American League of Professional Baseball Clubs. Only the respondent, Bowie K. Kuhn, appeared in the action; and the time for the defendants, The American League of Professional Baseball Clubs and Joseph Cronin, to answer or otherwise appear in the action was extended by stipulation until the 20th day following entry of an order of the United States Supreme Court upon the petition herein.

Respondent, Kuhn, moved in the United States District Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the action on the following grounds:

1. The court lacks jurisdiction of the subject matter in this action.

2. The complaint fails to state a claim against the defendant upon which relief may be granted.

3. The venue in this action has not been properly laid.

The United States District Court considered only grounds 1 and 2 and held that baseball was not subject to the anti-trust laws of the United States and that therefore the complaint failed to state a claim against the defendants upon which relief could be granted. Motion to dismiss the action was granted by Judge Croake.

Petitioners appealed to the Court of Appeals for the Second Circuit. A panel of that court (Waterman, Friendly and Hays) affirmed the decision of Judge Croake with an opinion by Judge Friendly.

Facts

Petitioners had been employed by The American League as major league professional umpires for approximately eight years prior to the events which gave rise to this action. They had performed their duties in a good, workmanlike manner year after year as major league umpires.

The complaint alleged: that on September 16, 1968 the petitioners were defamed, intentionally and maliciously by the defendant, Joseph Cronin, President of the American League, when he publicly called the petitioners incompetent in their work; that the petitioners were summarily discharged without notice or hearing for the true and only reason that they were engaged in activities and were participating in the organization of the American League Umpires for collective bargaining pursuant to applicable laws affecting business in interstate commerce; that respondent, Bowie Kuhn, as Acting Commissioner of Baseball, having authority to act for The American League, The National League and in combination and conspiracy with them in violation of the anti-trust laws, failed and refused to act to reinstate the plaintiffs to their profession as major league umpires; that as a result of this defamation and summary dismissal because of collective bargaining activities, the petitioners have been greatly and irreparably harmed and have brought the aforementioned action in

the District Court for treble damages pursuant to the Sherman and Clayton Anti-Trust Acts.

In affirming the decision of Judge Croake dismissing the action herein, the Circuit Court of Appeals said:

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic', 'inconsistent' and 'illogical.' "

At the conclusion of his opinion Judge Friendly continued:

> "While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the court is ready to give them a happy despatch."

Reasons for the Allowance of the Writ

The allowance of the writ of certiorari is urged for the following reasons:

The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this court in light of present-day conditions and circumstances of organized baseball which has undergone tremendous change since the applicability of the anti-trust laws to professional baseball was last before this court. Indeed, the Court of Appeals in its decision recognized that the rationale of *Toolson* was extremely dubious at best. Moreover, organized baseball has conceded in its argument in the courts below that baseball now is definitely a business engaged in interstate commerce. In light of the vast expansion of organized baseball and its huge growth of revenues derived from interstate broadcasting and other activities,

the important question of baseball's status under the anti-trust laws of the United States should be determined by this court.

Despite the requisite liberal interpretation required to be given to the allegations of the complaint of a conspiracy to exercise a group boycott against the petitioners because of their efforts to organize major league umpires for collective bargaining purposes, the Court of Appeals decided that the complaint fails to state a claim under the anti-trust laws, relying upon *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), and *Fashion Originators Guild of America* v. *FTC*, 312 U. S. 457 (1941).

In *Klor's* (*supra*), the defendant *Broadway-Hale Stores*, used its "monopolistic" buying power to bring about a boycott and refusal to deal with *Klor's*. The defendant did not dispute the allegations but sought summary judgment and dismissal of the complaint for failure to state a cause of action under the anti-trust laws. The motion was granted and the Court of Appeals, Ninth Circuit, affirmed the summary judgment, stating that "A violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured."

This court reversed the decision of the Court of Appeals in *Klor's* (*supra*), as being too restrictive an interpretation of the Sherman Act. This court said:

> "We think Klor's allegations clearly show one type of trade restraint and public harm which the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and Section 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce."

The complaint of the petitioners herein contains allegations which clearly make out a violation of the anti-trust

laws as a result of the conspiracy and group boycott against the petitioners herein by The American League, The National League and the Commissioner of Baseball acting in behalf of and representing both professional baseball leagues. Notwithstanding, the Court of Appeals said: "Even assuming this claim somehow also encompasses a violation of the anti-trust laws . . . we would have the further question whether a Federal court could consider it once the N.L.R.B. has begun proceedings." In support of this statement the Court of Appeals cited *Local Union No. 189, Amalgamated Meat Cutters and Butcher Work Men of North America, AFL-CIO, et al.* v. *Jewel Tea Company, Inc.*, 381 U. S. 676 (1965), where this court rejected an attack on the District Court's exercise of jurisdiction. Citing *United States* v. *Western Pacific Railroad Company*, 352 U. S. 59, 63-64, this court stated:

> "The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administative body for its views."
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>
> ". . . The doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.'"

Similarly, in the instant case the controlling legal issue must be decided as to whether professional baseball is entitled to further exemption from the anti-trust laws. The National Labor Relations Board cannot determine this vital

legal question. The proceeding before the N.L.R.B. can only delay and cannot decide the substantive rights of the petitioners herein under the anti-trust laws.

As in the *Meat Cutters* case (*supra*), the complaint herein is not that the parties have refused to bargain but, on the contrary, that they have conspired to effect a boycott against the petitioners. Indeed, in the proceeding before the National Labor Relations Board, one of the defendants herein, The American League, opposed the petition seeking an election in a unit of umpires employed by The American League upon the ground that baseball is exempt from N.L.R.B. jurisdiction by reason of the *Federal Baseball* and *Toolson* cases. While stipulating in that proceeding that the business of baseball was and is conducted substantially in interstate commerce, The American League urged the N.L.R.B. to decline to accept jurisdiction. Thus, the dilatory cycle is complete.

The proceeding before the N.L.R.B. in no way deprived the District Court of jurisdiction to entertain this suit under the anti-trust laws of the United States which affords treble damages, a remedy not obtainable before the N.L.R.B.

POINT I

Baseball is admittedly a business engaged in interstate commerce and, as such, should be held subject to the anti-trust laws of the United States.

It is pertinent to trace briefly the history of litigation affecting the central question of this action.

In 1922 the Supreme Court decided *Federal Baseball Club* v. *National League, etc.*, 259 U. S. 200. Presented with the somewhat primitive business operations of baseball in 1922, the Supreme Court in *Federal Baseball* held that baseball was not conducting interstate business within the purview of the anti-trust laws at that time. Forty-

eight years ago, in 1922, television itself was only a dream and even radio broadcasting of sports had not yet commenced. Organized baseball was limited, essentially, to its revenues from gate receipts and refreshment concessions.

Since 1922 the character of baseball's business has changed radically. Indeed, in a 1969 proceeding before The National Labor Relations Board instituted by The National League Baseball Umpires Association against the American League, one of the defendants herein, The American League, stipulated that "the business of the employer (The American League) was conducted substantially in interstate commerce." The American League opposed the petition seeking an election in a unit of umpires employed by The American League upon the ground that baseball is exempt from N.L.R.B. jurisdiction by reason of *Federal Baseball Club* and *Toolson* v. *N. Y. Yankees, Inc.*, 346 U. S. 356 (1953).

On December 18, 1969, The National Labor Relations Board (180 N.L.R.B. No. 30) found that it does have jurisdiction and implemented its decision by directing the holding of an election under specific administrative procedures.

The decision of N.L.R.B. (cited *supra*), is a reflection of the present state of conditions affecting organized baseball. There has been a long history of vacillation by the Congress and the Federal courts respecting the anomalous status of baseball. It is pertinent to note the evolution of illogical processes by which baseball has come to enjoy its present exemption from the anti-trust laws. In *Toolson*, the majority *per curiam* decision adhered to the decision in *Federal Baseball* in the following language:

> "Without reexamination of the underlying issues, the judgments below are affirmed on the authority of (Federal Baseball) so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the Federal anti-trust laws."

In *Toolson*, the dissenting opinion of Mr. Justice Burton painstakingly detailed the history and status of this question. He pointed out that in *Federal Baseball:*

> "The Court acted on its determination that the *activities before it* did not amount to interstate commerce." (emphasis supplied)

Justice Burton pointedly asserted that this court in *Federal Baseball* did not state that even if baseball did constitute interstate commerce it was exempt from the Sherman Act, but only stated that *at that time* baseball was not engaged in interstate commerce. Thus, it is clear that no categorical exemption was ever intended.

Indeed, Mr. Justice Holmes (the writer of the court's opinion in *Federal Baseball*) stated in *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271 (1923):

> "What in general is incidental (interstate commerce activity) in some instances may rise to a *magnitude* that requires it to be considered independently." (emphasis supplied)

Thus, only one year after his decision in *Federal Baseball* (*supra*), Justice Holmes was aware and specifically recognized that *Federal Baseball* did not and could not in perpetuity exempt baseball from application of the antitrust laws. It was a question of "magnitude" or "degree". Indeed, in 1922 baseball was little more than a hobby of industrialists indulging in the sport of baseball and deriving little or no revenue beyond the gate receipts obtained when games were played.

In *U. S.* v. *International Boxing Club*, 348 U. S. 236 (1955), the Supreme Court said:

> "The controlling consideration in *Federal Baseball* and *Hart* was instead a very practical one—*the degree of interstate activity* involved in the particular business under review." (emphasis supplied)

Mr. Justice Burton in *Toolson* (1953) cited the Congressional Sub-committee on Study of Monopoly Power of the House of Representatives as having asserted its jurisdiction to investigate and legislate on the subject of professional baseball (which it never has done).

This question of the role of Congress vis-a-vis the courts in the baseball-anti-trust problem has been adverted to repeatedly by the appellate Federal Courts. Thus, in *U. S.* v. *International Boxing Club*, *supra*, this Court stated that Congress, through its aforementioned committee, had postponed consideration of any legislation affecting baseball until the status of *Federal Baseball* (*supra*) was clarified in the courts.

The attention paid in *Toolson* to the inactivity of Congress since *Federal Baseball Club* should be accorded but slight weight. See *Blau* v. *Lehman*, 368 U. S. 403 and dissenting opinion of Douglas, J. and *Helvering* v. *Hallock*, 309 U. S. 106.

Running through the pertinent decisions is the striking anomaly of the courts adhering to the obsolete decision of *Federal Baseball* so as to confer upon organized baseball an exempt status never created nor intended by the Congress. Despite the repeated references in court decisions to the power of Congress to grant to organized baseball an immunity from the anti-trust laws, the Congress never has seen fit to enact such exemptions. The deference by Congress to the courts and deference by the courts to Congress upon this question is a remarkable display of Alphonse-Gaston inertia creating a unique and unjustifiable preferred status for the business of organized baseball.

POINT II

The *Federal Baseball* and *Toolson* cases have no application to the present-day status of professional baseball and should be overruled by this court.

Upon the trial of this case proof will show, in contrast to the primitive business activities of professional baseball in 1922, a phenomenal growth of broadcasting revenues is occurring. For the playing year of 1969 alone professional major league baseball was paid approximately $37,190,000 for broadcasting rights of major league baseball games. NBC-TV paid, additionally, $15,500,000 to the major leagues for broadcast rights of Saturday games, certain night games, the All Star Game and World Series games. Pretrial depositions will elicit the amount of revenues obtained for broadcast rights of divisional play-off games.

This huge revenue in 1969 is in marked contrast to the paltry sum of $3,000,000 derived from broadcasting revenues in 1950. The annual increases are proceeding apace.

All of these and other activities are manifestly interstate in character. The broadcasts cross over every state line and reach into the most remote corners of our land and numerous points abroad. The "magnitude" and "degree" of this phenomenal growth no longer can or should be ignored under the cloak of *stare decisis*.

This court now is presented with the anomalous situation of organized baseball's being granted an exemption from anti-trust laws despite its admitted interstate activities and revenues mounting at an astounding annual rate. The interstate commerce of baseball involves the lives and economic welfare of ever-increasing numbers of persons, including the petitioners, who participate in its various activities. They and others in the business of baseball are entitled to a forthright litigation of this subject matter to obtain the full benefits of the anti-trust laws since the outcome affects their security and job tenure.

In *U. S.* v. *Shubert*, 348 U. S. 222, page 230 (1955), this court said regarding *Toolson (supra)*:

> "In short, Toolson was a narrow application of stare decisis."

The rule of *stare decisis* must and often does yield to the rule of reason when changed circumstances and the fair application of principles of justice require reexamination. *Brown* v. *Board of Education of Topeka* (1954), 347 U. S. 483. In *Radovich* v. *National Football League*, 352 U. S. 445 (1957), this court referred to its own decision in *Federal Baseball* as "a ruling which at best was of dubious validity." Certainly, upon this appeal the decision in *Federal Baseball* is obsolete under the changed circumstances of today.

There should be no rationalization and blind adherence to this court's position under 1922 conditions upon this appeal where the plaintiffs are entitled to every reasonable inference to be drawn from the allegations in the complaint.

POINT III

The complaint states a good cause of action under the anti-trust laws: the motion to dismiss the action should have been denied.

The complaint alleges in substance that plaintiffs were professional umpires employed for many years by The American League (par. 19); they performed their duties in good and workmanlike manner year after year (par. 20); and on September 16, 1968 the plaintiffs were defamed intentionally and maliciously by defendant, Joseph Cronin, acting individually and as President of The American League (par. 21); that plaintiffs were discharged summarily without notice or hearing for the true and only reason that they were engaged in activities in organizing

American League umpires for collective bargaining pursuant to applicable laws affecting business in interstate commerce (pars. 22, 25).

The complaint further contains allegations that the defendants acted in combination and conspiracy with each other to violate the Federal anti-trust laws, failed to act to reinstate the plaintiffs to their positions as major league umpires and effected a group boycott of plaintiffs, all in violation of the Sherman and Clayton Acts (pars. 26, 27, 28).

The Court of Appeals in its decision said the following:

> "Wrongful discharge of an employee does not become an anti trust violation simply because the employer is a monopolist; the private right of action is conferred only for an injury 'by reason of anything forbidden in the anti-trust laws,' 15 U.S.C. Section 15."

The complaint not only alleged a wrongful discharge of petitioners but also a conspiracy, agreement and tacit understanding among and between the defendant, American League, and the respondent, Kuhn, individually and in his capacity as the Commissioner of Baseball, representing both The American League and The National League which deprived petitioners of their rights of collective bargaining and their employment and profession as major league baseball umpires.

The Court of Appeals stated that the complaint contained no allegations indicating restrictive trade practices directed at umpires. It is respectfully submitted that the allegations of dismissal and subsequent boycott of the petitioners because of their attempts at organizing umpires for collective bargaining purposes was, in substance, the allegation of a wrongful restrictive trade practice by baseball through its monopolistic power. It was a trade re-

straint and a public harm forbidden by the Sherman Act with the same unlawful purpose condemned in *Klor's (supra)* by this court.

In *Klor's* this court, in overruling the Court of Appeals for the Ninth Circuit, held that action by conspirators to deprive even a single merchant, like Klor, of the goods he needed to compete effectively constituted a violation of the Sherman Act. This court said:

> "As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small business men, one at a time, as it can by driving them out in large groups."

The petitioners herein, two baseball umpires, are situated similarly to Klor. Their destruction would make little difference to the national economy. However, to them their injury has been grave and total and their livelihood shattered by their arbitrary dismissal on September 16, 1968. And one by one their fellow umpires can be driven out of their profession at the will and pleasure of organized baseball. The tight monopoly exercised by the defendants, if exempt from anti-trust laws, affords to them absolute control enabling them effectively and arbitrarily to exclude petitioners and their fellow umpires from pursuing their chosen profession. There exist no other competing baseball leagues where petitioners might market their services. Indeed, even the minor leagues, which are controlled by the defendants, pay their umpires only a small fraction of the salary commanded by major league umpires. Employment in the minor leagues would be an economic disaster providing no viable alternative employment for these experienced major league umpires.

Literally, by reason of this monopoly thus far legally sanctioned, the petitioners have nowhere else to go.

Should baseball, under existing conditions, be subject to the same anti-trust restraints now applicable to other organized sports being conducted for profit in the United States?

This island of exemption was created fortuitously in the distant era of 48 years ago when conditions were totally different. The allegations in the complaint must be deemed true (and indeed are admitted by defendants), i.e., that the structure and interstate activity of baseball has changed and grown so as to clearly constitute business in interstate commerce. The *degree* and *magnitude* of interstate activity of baseball under present-day changed circumstances forecloses further rationalization to perpetuate this unjustifiable anomaly under our laws.

The Federal courts already have declared other sports activities to be subject to the anti-trust laws.

Boxing: Boxing has been held to constitute trade or commerce subject to the Sherman Act in *U. S.* v. *International Boxing Club,* 348 U. S. 236 (1955).

Basketball: The business of professional basketball conducted like professional baseball, on a multi-state basis, was held to be trade or commerce among the several states within the meaning of the Sherman Act in *Washington Professional Corp.* v. *National Basketball Association,* 147 F. Supp. 1954 (S.D.N.Y. 1956).

Football: Allegations that interstate television accounted for significant portions of the defendants' gross receipts and that professional football would be unprofitable without such receipts were held to state jurisdictional facts under the Sherman Act in *Radovich* v. *National Football League,* 352 U. S. 445 (1957).

The complaint herein amply sets forth violations of the anti-trust laws with direct resultant injury to the petitioners herein. Redress can be secured only after a trial on

the merits in the District Court of the United States. The complaint sufficiently stated a cause of action under the anti-trust laws and the motion to dismiss the action should have been denied.

POINT IV

The relief sought herein can be obtained only in the courts of the United States: the doctrine of primary jurisdiction of the National Labor Relations Board does not apply to this case.

This is an action for treble damages pursuant to Section 4 of the Clayton Act. The injury to petitioners arose not from a refusal to bargain by the respondent and defendants but from an agreement and conspiracy among them to effect a boycott against petitioners for their activities in organizing major league umpires.

The National Labor Relations Board can provide no remedy for damages of the petitioners suffered as a result of the violation of the anti-trust laws of the United States. This case raises issues of fact clearly within the purview and exclusive powers of the Federal courts to provide redress under the anti-trust laws.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX A

Opinion of Judge Thomas F. Croake.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ALEXANDER J. SALERNO and WILLIAM VALENTINE,

Plaintiffs,

against

AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS, an unincorporated association, JOSEPH E. CRONIN, individually and as President of the American League of Professional Baseball Clubs, BOWIE KUHN, individually and as the Commissioner of Baseball, and PAUL PORTER,

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CROAKE, D. J.

Appendix A.

MEMORANDUM

This is an action for damages against the above-named defendants for alleged violations of the Sherman Anti-Trust Act (15 U.S.C. Sections 1 and 2), and the Clayton Act (15 U.S.C. Sections 15 and 26), arising out of the "unlawful dismissal and boycott" of plaintiffs from employment as American League Baseball umpires by defendants who, the complaint alleges, are "conducting . . . organized professional baseball as an illegal agreement, combination and conspiracy in restraint of trade and as a monopoly in violation of (the above-named acts)." Action was commenced in this Court by the filing of a complaint on September 23, 1969, which was served upon Bowie K. Kuhn, as individual defendant and Commissioner of Baseball on October 3, 1969. The other named defendants who have not been served in this action are, the American League of Professional Baseball Clubs (American League), an unincorporated association, Joseph E. Cronin, individually and as President of the American League, and Paul Porter.

Defendant, Bowie K. Kuhn, brings on this motion, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, seeking an order to dismiss the action against himself on the following grounds:

1. The court lacks jurisdiction of the subject matter in this action.
2. The complaint fails to state a claim against defendant upon which relief may be granted.
3. The venue in this action has not been properly laid.

With regard to jurisdiction, plaintiffs allege, first, that "jurisdiction is conferred upon this Court by reason of diversity of citizenship," and, second, that "this action arises under the anti-trust laws of the United States."

Appendix A.

In order for the Court to have subject matter jurisdiction under 28 U.S.C. Sec. 1332, it is necessary that there be complete diversity of citizenship, which has been interpreted to mean that the citizenship of each plaintiff must be diverse from that of each defendant. *Levering & Garrigues Co.* v. *Morrin*, 61 F. 2d 115 (2d Cir., 1932), aff'd 289 U. S. 103 (1933); *John Birch Society* v. *National Broadcasting Co.*, 377 F. 2d 194 (2d Cir. 1967); *Potter's Photographic Applications Co.* v. *Ealing Corporation*, 292 F. Supp. 92 (S.D.N.Y. 1968).

The complaint in this case alleges that plaintiff Salerno and defendant Kuhn are each citizens of New York State. Plaintiff further alleges that defendant American League is an unincorporated association whose members, other than the New York Yankees, are "citizens of . . . various states other than New York." It is therefore conceded that one member of the unincorporated association of the American League, the New York Yankees, is a resident of New York. Although there is some question as to whether defendant Kuhn is an actual resident of New York, plaintiff Salerno and defendant American League, through its member, the New York Yankees, are in fact both residents of New York State.

It is well established that the citizenship of an unincorporated association is determined by the residence of all its individual members and that complete diversity cannot exist unless each member of an unincorporated association is a citizen of a state other than that of each plaintiff. See *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U. S. 145 (1965); *Rosenthal & Rosenthal, Inc.* v. *Aetna Casualty & Surety Co.*, 259 F. Supp. 624 (S.D.N.Y. 1966); *Fine* v. *Philip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964).

Moreover, the fact that the above-named defendant, American League, has not been served does not affect the

consideration of its citizenship as a party in determining the existence of diversity in this action. *Oppenheim* v. *Sterling*, 368 F. 2d 516 (10th Cir. 1966), *cert. denied*, 386 U. S. 1011 (1967).

Consequently, there can be no complete diversity in the present case and this Court lacks jurisdiction of the subject matter pursuant to 28 U.S.C. Sec. 1332.

Plaintiffs base their second grounds for jurisdiction on Sec. 4 of the Clayton Act (15 U.S.C. Sec. 15), which provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy . . ."

In attempting to establish jurisdiction under the above section of the Clayton Act, plaintiffs seek what they consider to be a necessary re-evaluation of the decision of the United States Supreme Court in *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922), in which the Court exempted professional baseball from the federal antitrust laws. Plaintiffs point out that the Supreme Court decision of *Federal Baseball, supra*, was decided at a time when baseball was clearly not an interstate business and that today baseball has grown to such a degree that it "is conducted substantially in interstate commerce."

While plaintiffs' argument is somewhat appealing, this Court considers itself bound by the United States Supreme Court decisions of *Federal Baseball, supra*, and *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), where the Court states at 357:

> "Without reexamination of the underlying issues, the judgments below are affirmed on the authority of . . .

(Federal Baseball) so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws."

Moreover, in three cases subsequent to *Toolson, supra*, the United States Supreme Court has clearly stated that any action involving the expansion or contraction of the exemption of baseball from the federal anti-trust laws must come from Congress. *United States* v. *Shubert*, 348 U. S. 222, 230 (1955); *United States* v. *International Boxing Club*, 348 U. S. 235, 243 (1955); *Radovich* v. *National Football League*, 352 U. S. 445, 451 (1957).

Since baseball is exempt from the federal anti-trust laws by decision of the United States Supreme Court, this complaint fails to state a claim against defendant upon which relief can be granted.

Having found that no diversity of citizenship exists under 28 U.S.C. sec. 1332 and having found that organized baseball does not fall within the scope of the federal anti-trust laws, this Court lacks jurisdiction of the subject matter, which is an absolute prerequisite for continuance of an action in the district court under Rule 12(h)(3), Fed. R. Civ. P.

Accordingly, the motion of defendant seeking an order to dismiss this action pursuant to Rule 12(b) is granted. The action is dismissed.

So ordered.

Dated: New York, N. Y.,
December 10, 1969.

THOMAS F. CROAKE,
Thomas F. Croake,
U.S.D.J.

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 818—September Term, 1969.
(Argued May 26, 1970 Decided July 13, 1970.)
Docket No. 34653

ALEXANDER J. SALERNO and WILLIAM VALENTINE,

Plaintiffs-Appellants,

—against—

AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS, an unincorporated association, JOSEPH E. CRONIN, individually and as President of the American League of Professional Baseball Clubs, and PAUL PORTER,

Defendants,

BOWIE KUHN, individually and as the Commissioner of Baseball,

Defendant-Appellee.

Before:

WATERMAN, FRIENDLY and HAYS,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Thomas F. Croake, *Judge*, dismissing a complaint by two discharged umpires against the American League of Professional Baseball Clubs, the Commissioner of Baseball and others. Affirmed.

Appendix B.

JOSEPH KELNER, Esq., New York, New York, *for Plaintiffs-Appellants.*

GEORGE S. LEISURE, JR., Esq. (Donovan, Leisure, Newton & Irvine and Paul E. Goodspeed and Paul A. Crotty, New York, New York, of Counsel), *for Appellee, Bowie Kuhn.*

FRIENDLY, *Circuit Judge:*

Plaintiffs, former umpires in the American League of Professional Baseball Clubs, were discharged by the president of the League. Although he announced that this was for incompetence, plaintiffs claim "the true and only reason" was their endeavor to organize the American League umpires for collective bargaining. Following an unfair labor practice charge on their part, the National Labor Relations Board issued a complaint under §§ 8(a)(1) and (3) of the Act, Case No. 1-CA-6581, on March 26, 1970, and this has been referred to a Trial Examiner for hearing. See 180 N.L.R.B. No. 30 (Dec. 15, 1969), 38 L.W. 2351.

Before that the plaintiffs had filed a complaint in the District Court for the Southern District of New York. They named as defendants the American League of Professional Baseball Clubs; Joseph E. Cronin, its president; Bowie Kuhn, the Commissioner of Baseball; and Paul Porter, a well-known Washington attorney. Only Kuhn was served. The complaint contained two counts. The first alleged a claim under the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2 & 15; the second asserted a claim for defamation. When Kuhn moved to dismiss for want of federal jurisdiction, plaintiffs maintained there was both federal question and diversity jurisdiction. Finding neither, the district court granted the motion. Since the diversity claim has now been

abandoned, all that is left is the claim under the antitrust laws.

Even if we were sure that professional baseball will be held subject to the antitrust laws, we would entertain serious doubt whether the complaint here stated a claim under them. Combining an assertion of general antitrust violation with a claim of injury from breach of contract or tort does not automatically make the latter a claim arising under the antitrust laws. As Judge Kaufman observed in a rather similar context, *Molinas* v. *National Basketball Ass'n*, 190 F. Supp. 241, 243 (S.D.N.Y. 1961), a plaintiff in a civil antitrust action "must establish a clear causal connection between the violation alleged and the injuries allegedly suffered." See also *Tepler* v. *Frick*, 204 F. 2d 506 (2 Cir. 1953). Wrongful discharge of an employee does not become an antitrust violation simply because the employer is a monopolist; the private right of action is conferred only for an injury "by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15. Although the complaint has elaborate allegations of conspiracy in restraint of trade, there is nothing to indicate restrictive trade practices directed at umpires. In the nature of things these must be employed—and discharged—by a league rather than by a single club. The only pertinent allegations going beyond discriminatory discharge by the president of the American League are that Kuhn is employed as Commissioner by both the American and the National Leagues, that plaintiffs' discharge was with Kuhn's "knowledge, permission and consent," and that defendants "did, in fact, restrain and monopolize . . . trade and commerce in violation of Sections 1 and 2 of the Sherman Act by means of a group boycott against plaintiffs." Even the requisite liberal interpretation of these allegations does not over-

come the great difficulty in finding that a claim was stated under such cases as *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), and *Fashion Originators Guild of America* v. *FTC*, 312 U. S. 457 (1941). Moreover, plaintiffs' real grievance is their alleged discriminatory discharge in violation of the National Labor Relations Act, and this is being considered by the agency appointed for the purpose by Congress. Even assuming this claim somehow also encompasses a violation of the antitrust laws, which is highly doubtful, we would have the further question whether a federal court could consider it once the NLRB has begun proceedings. See *Meat Cutters Local 189* v. *Jewel Tea Co.*, 381 U. S. 676 (1965); cf. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

Apart from these exceedingly serious obstacles, plaintiffs recognize that they can prevail only if we should be willing to predict the likely overruling of the holdings in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), that professional baseball is not subject to the antitrust laws. Cf. *Green* v. *Board of Elections of City of New York*, 380 F. 2d 445, 448 (2 Cir. 1967), and cases there cited. They say that changes in the economics of the sport even since *Toolson*, especially the increasing importance of revenues from interstate television broadcasts, make baseball's immunity from the antitrust laws more anomalous than ever. But the ground upon which *Toolson* rested was that Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce. Cf. *Gardella* v. *Chandler*, 172 F. 2d 402, 407-08 (2 Cir. 1949). We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes'

happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is "unrealistic," "inconsistent" and "illogical." *Radovich* v. *National Football League,* 352 U. S. 445, 452 (1957). We add that *Boys Mkts., Inc.* v. *Retail Clerk's Local 770,* 38 L. W. 4462, decided June 1, 1970, overruling *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962), despite Congress' failure to act on invitations to do so, may presage a change from the attitude with respect to such inaction that was expressed in *Toolson,* 346 U. S. at 357, which Mr. Justice Black in dissent invoked to no avail, 38 L. W. at 4469. However, putting aside instances where factual premises have all but vanished and a different principle might thus obtain, we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch.

Affirmed.